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In the Supreme Court of the United States

OCTOBER TERM, 1961

AARON ROSENZWEIG, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES; BERNARD L. BOUTIN, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 636

AARON ROSENZWEIG, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES, BERNARD L. BOUTIN, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on December 6, 1961 (Pet. App. 23). The order amending the opinion and denying a timely petition for rehearing was entered on January 2, 1962 (Pet. App. 24). The petition for a writ of certiorari was filed on February 1. The jurisdiction of this Court is invoked under 50 U.S.C. App. 924(d) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Emergency Court of Appeals was correct in upholding the validity of the letter-order which invalidated Central Packing Company's subsidy claims because of wilful violations of the Emergency Price Control Act of 1942.

STATUTE AND REGULATIONS INVOLVED

1. Section 924 of 50 U.S.C. App. provides in pertinent part:

* * * * *

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law; or is arbitrary or capricious. * * *

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a court of appeals as provided in section 240 of the Judicial Code, as amended. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine

the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

* * * * *

2. Directive 41 of the Office of Economic Stabilization, 10 F.R. 4494, provided in pertinent part:

* * * * *

Section 7(b)(1): Defense Supplies Corporation is directed to continue its present procedure of declaring invalid, in whole or in part, any claim for subsidy payment filed by an applicant who, in the judgment of the Price Administrator, has wilfully violated any meat or livestock regulation or order issued by the Price Administrator. Such a judgment shall be made only in the event the alleged violation is referred to the United States Attorney for prosecution.

* * * * *

Amendment 11 to Directive 41 of the Office of Economic Stabilization, 12 F.R. 2408, provided in pertinent part:

Section 4004.1 *Livestock Slaughter payments* (Directive 41) is amended by the addition of the following paragraphs to section 7(b)(1):

As used in this Section 7(b)(1) the phrase "its present procedure" was intended to and does refer to the procedure whereby subsidy funds are withheld from subsidy applicants involved in criminal proceedings. The procedure was and is as follows:

Withholding of subsidy funds from a subsidy applicant involved in criminal proceedings is initially recommended to the Reconstruction Finance Corporation by the Price Administrator only when all three of these factors are present:

(1) the Price Administrator (or his duly authorized representative) has investigated the alleged wilful violation and referred the case to the United States Attorney for the institution of criminal proceedings;

(2) the grand jury has returned an indictment or the United States Attorney has filed an information against the subsidy applicant for the alleged wilful violations of any meat or livestock regulation or order issued by the Price Administrator; and

(3) a responsible member of the applicant's management was chargeable with knowledge of the facts alleged to constitute the wilful violation.

The amount of subsidy money withheld is that allocable to the selling establishments involved in the criminal proceedings, and, as to each selling establishment, to the accounting periods during which the violations are alleged. • • •

• • • • •

STATEMENT

Petitioner has adopted as its own (Pet. 3) the Emergency Court of Appeal's statement of the pertinent facts and the background of this case. This statement is equally acceptable to respondent. As it appears in the court's opinion (Pet. App. 9-14), with minor modifications, the case may be stated as follows:

1. *The facts and proceedings.*

During 1944 Charles M. King, Hyman Stillman and Leo Segal entered into a partnership arrangement known as Southern California Meat Company No. 2. Allied in this enterprise was Southern California Meat Co., Inc., a corporation principally owned by King. Southern California Meat Co., Inc. was to slaughter cattle and Southern California Meat Company No. 2 was to sell the meat. It appears that Southern California Meat Company No. 2 charged overceiling prices on the sale of meat and due to difficulties in obtaining subsidy payments the use of Southern California Meat Company No. 2 was abandoned.

In place of the previous partnership arrangement, Southern California Meat Co., Inc., King, Stillman and Segal late in 1944 entered into a similar arrangement under the name of Central Packing Company.[1] The name, Central Packing Company, was that of an existing business owned by the petitioner, which had a slaughtering license. The Central Packing Com-

[1] It is not clear from the record whether the four above named or only Stillman and Segal were partners in this business. The facts as set out above are those alleged by the petitioner and adopted by the respondent.

pany had a clean meat purchasing and selling record on the basis of which Stillman, Segal, King and King's corporation, Southern California Meat Co., Inc., could claim and receive subsidy payments. During February and March, 1945, Central Packing Company filed applications with Defense Supplies Corporation,[2] pursuant to Revised Regulation No. 3,[3] for cattle slaughter subsidy payments in the aggregate sum of $143,303.40. These subsidy claims, signed by the petitioner as "Owner", and paid by Defense Supplies Corporation to Central Packing Company, are the subject of this controversy.

During February 1946, Southern California Meat Co., Inc., King, Stillman and Segal were indicted in the United States District Court for the Southern District of California, Central Division, No. 18,366, for violations of and conspiracy to commit violations of the Emergency Price Control Act of 1942 and the applicable regulations promulgated thereunder. It was charged that these defendants operated under the firm names of Southern California Meat Co., Inc., Southern California Meat Company No. 2, and Central Packing Company, and that they shared in all gains and profits accruing from the illegal activities described in the indictment. Among the overt acts were those charging the defendants with the issuance, during February and March, 1945, of certain invoices

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[2] Prior to this period and until July 1, 1945, Defense Supplies Corporation acted as the paying or disbursing agent in respect to livestock slaughter subsidies. Sec. 5d of the Reconstruction Finance Corporation Act, as amended, 15 U.S.C. 606b, 6 F.R. 2972.

[3] 10 F.R. 4241, effective January 19, 1945.

of Central Packing Company showing that meat had been sold at overceiling prices. On July 5, 1946, all four defendants were found guilty and judgments were entered against them. The petitioner, while admittedly associated in the business of Central Packing Company, was never indicted or found guilty of any connection with such activities.

On December 23, 1947, a letter-order was sent by Reconstruction Finance Corporation,[1] the agency then in charge of such matters, addressed to Central Packing Company, in care of the petitioner, stating that, as the result of an investigation, its subsidy claims were being declared invalid for the period from August 1944 through April 1945. Accordingly, demand was made for reimbursement of the sum of $196,962.62, plus interest. On January 7 and 9, 1948, the petitioner requested information with respect to the basis on which these claims were declared invalid. The parties treated the letter of January 9, 1948, as a formal protest against the letter-order of December 23, 1947. On January 16, 1948, petitioner was advised that the case had been referred to the Department of Justice and was being handled by the Legal Division of Reconstruction Finance Corporation.

No further action was taken until May 1958 when the United States filed a civil action, No. 423–58–BH,

[1] Defense Supplies Corporation was dissolved on July 1, 1945, and its functions transferred to Reconstruction Finance Corporation. Act of June 30, 1945, 59 Stat. 310, 15 U.S.C. 611 note. Revised Regulation No. 3, as amended, was then administered by Reconstruction Finance Corporation as the paying agent. 10 F.R. 11155.

in the United States District Court for the Southern District of California, Central Division, against King, Stillman, Segal and the petitioner doing business as Central Packing Company, and Southern California Meat Co., Inc., for the recovery of the subsidy payments in question. Default judgments were entered against defendants Stillman and Segal. The action against King and Southern California Meat Co., Inc., was dismissed. The action against the petitioner was dismissed without prejudice on the ground that a protest against the letter-order of December 23, 1947, was still pending. On June 27, 1960, the petitioner wrote General Services Administration, the Administrator of which was the successor to Reconstruction Finance Corporation,[5] seeking a determination of the pending protest and attacking the validity of the order on the ground that the petitioner had not violated any applicable statutes or regulations.

On August 4, 1960, the respondent informed the petitioner that the claims of Central Packing Company for the period from August 1944 through January 1945 in the amount of $53,659.22 were being reinstated but that the February and March 1945 claims remained invalid because of the wilful violations of the Office of Price Administration regulations by Central Packing Company during those two months, which violations were confirmed by the criminal judgments entered against Segal and Stillman.

[5] Reconstruction Finance Corporation was abolished and its functions with respect to the meat subsidy program were transferred to the respondent, the Administrator of General Services, effective June 30, 1957. Reorganization Plan No. 1 of 1957, 71 Stat. 647, 22 F.R. 4633, 15 U.S.C. 601 note.

The letter further stated that, inasmuch as the government had not been successful in its efforts to obtain restitution from Segal and Stillman of the meat subsidy payments made to Central Packing Company, and, since the petitioner was a partner in Central Packing Company, demand was being made on petitioner for restitution of the sum of $143,303.40, plus interest. This letter was treated by the respondent as a new order invalidating the claims and seeking recapture of the money paid to Central Packing Company, which superseded the letter-order of December 23, 1947. On August 15, 1960, the petitioner protested this letter-order of August 4, 1960, pointing out that neither he nor Central Packing Company had been indicted or convicted in the California criminal proceeding referred to and that there never was any determination, judicial or administrative, that Central Packing Company or the petitioner himself was in wilful violation of the regulations. Correspondence subsequently passed between the petitioner and the respondent in which each expressed his views in respect to the liability of Central Packing Company and the petitioner for restitution of the subsidy payments in question. The petitioner's protest was denied on December 7, 1960, and the issue of the validity of the letter-order of August 4, 1960, was then brought by petitioner to the court below.*

2. *The applicable regulations.*

The express authority to declare subsidy claims invalid for wilful violations of OPA regulations was

* Under Section 204(d) of the Emergency Price Control Act, 50 U.S.C. App. 924(d), *supra*, pp. 2-3.

contained in Section 7003.10(a) of Revised Regulation No. 3 and amendments thereto.[7] That section required a determination by the Price Administrator and the others to whom the duty was subsequently delegated[8] that the subsidy applicant had wilfully violated an applicable regulation, or a certification by that officer that the subsidy applicant had been determined in a civil proceeding to have violated a substantive provision of an applicable regulation. The issue here concerns the validity of the determination by the respondent in the letter-order of August 4, 1960 (*supra*, pp. 8–9), that the Central Packing Company had wilfully violated applicable price control regulations. Section 7(b)(1) of Directive 41 (*supra*, pp. 3–4) sets out the factors on which the officer is to base his determination of a wilful violation. Section 7003.10(a) of Revised Regulation No. 3 must be construed in conformity with Section 7(b)(1)

[7] 10 F.R. 4243; 10 F.R. 8073; 10 F.R. 11153–11154.

[8] The authority to make such determinations ultimately was vested in the respondent, the Administrator of General Services, under the following sequence of events: The functions of the Price Administrator and the Economic Stabilization Director were transferred to the Temporary Controls Administrator by Executive Order 9809, issued December 12, 1946, 11 F.R. 14281, 50 U.S.C. App. 601 note. Then the functions of the Temporary Controls Administrator with respect to subsidies were transferred to Reconstruction Finance Corporation by Executive Order 9841, effective May 4, 1947, 12 F.R. 2845, 50 U.S.C. App. 601 note. Finally, these functions were transferred to the respondent by Reorganization Plan No. 1 of 1957, 71 Stat. 647, 22 F.R. 4633, 15 U.S.C. 601 note. There were coalesced in the Reconstruction Finance Corporation, and finally in the respondent, the responsibilities of both certification and payment.

of the Directive, which provides in this connection that a recommendation of the Price Administrator (or his successor) for the permanent withholding or recapture of subsidy payments because of wilful violation of the regulations may only be made after the conviction of the subsidy applicant in a criminal proceeding involving subsidy payments for the periods in question."[9]

ARGUMENT

This is plainly not a case for this Court to consider, arising, as it does, out of the World War II price control program. The only issue properly presented is a narrow question of no present importance beyond this case and of no future significance."[10] The decision of the Emergency Court of Appeals is, moreover, clearly correct.

1. The determination that Central Packing Company had wilfully violated the established ceiling price requirements was made in full conformity with the applicable regulations."[11] Petitioner renews his attack

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[9] Amendment 11 to Directive 41 (*supra*, pp. 3–4), issued by the Temporary Controls Administrator effective April 8, 1947, 12 F.R. 2408.

[10] There are no pending cases raising the same issue.

[11] The purpose of Section 7(b)(1) of Directive 41 (*supra*, pp. 3–4) was to prevent the diversion of subsidy funds from the implementation of the price control program. *Armour & Co.* v. *Reconstruction Finance Corporation*, 162 F. 2d 918 (Em. Ct. App.). It would violate that purpose to allow a subsidy claimant to retain payments received during periods when it had been judicially determined that there were wilful violations of program regulations. The administrator does not seek to impose a penalty but to facilitate the underlying object by denying an applicant funds to which it is clearly not entitled.

on the validity of the letter-order by pointing out that neither he nor the partnership entity was named in the criminal proceeding that established the basis for the administrative finding that Central was in "wilful violation" of the price control regulations.

But the taint incident to the criminal conviction of the individual partners encompassed Central Packing Company, for the purposes of Section 7(b)(1) of Directive 41 (*supra*, pp. 3–4). A partnership is normally not an entity distinct from its membership and can act only through the initiative of its individual partners. *Jung* v. *Boicles*, 152 F. 2d 726 (C.A. 9). It was long ago settled by this Court that the innocence of a partner with respect to the wrongdoing of another is not sufficient to bar the imposition of liability upon the partnership entity (or on the individual partners in their partnership capacity). *McIntyre* v. *Kavanaugh*, 242 U.S. 138.

Although, under the regulations,[12] a partnership was included in the definition of "person", no provision in the Emergency Price Control Act required that a criminal proceeding for wilful violation be separately brought against the partnership if the partners comprising the partnership had violated the Act in connection with partnership business. The statutory definition merely sought to establish the right of the partnership entity, as such, to file and receive in its own name subsidy payments.

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[12] "§ 7003.1 *Definitions.* When used in the regulations in this part, the following terms shall have the following meanings:

"(a) 'Person' means an individual, corporation, partnership, association, institution, or other business entity, or legal successor or representative of any of the foregoing. [10 F.R. 4241.]"

2. The petitioner seeks to raise before this Court (Pet. 8–12) an issue that has not been litigated and not decided by the court below, *i.e.*, his personal accountability to the government on a restitution claim for the amount of the subsidy payments. This argument ignores the very narrow scope of the authority exercised by the court below. The jurisdiction of the Emergency Court of Appeals was derived solely from the Emergency Price Control Act which empowered it to consider the validity of regulations and orders issued under Section 2 of that Act. See *supra*, pp. 2–3. The determination of the court below is entirely consistent with this limited statutory grant of jurisdiction. Indeed, the opinion goes to great lengths to acknowledge explicitly the limited authority of the court and to point out that it was not, and could not, pass judgment on the personal liability of the petitioner.

In order to collect on its claim, it will be necessary for the government to institute suit in an appropriate district court for enforcement of its restitution order. The liability of the petitioner for the debt of Central Packing Company will at that time be properly in issue for the first time and petitioner will then have full opportunity to assert any defenses he believes available to him. Only the validity of the letter-order determining that Central Packing Company violated price regulations will be foreclosed from further scrutiny.

Petitioner's attempt to create issues of constitutional dimension based upon an alleged deprivation of property without due process of law is based upon

the wholly fallacious assumption that the determination of the court below has the effect of holding him personally responsible for the criminal acts of other members of the partnership. As we have noted, the court below unequivocably confirmed its lack of authority to decide this issue. Petitioner will have ample opportunity to defend the alleged vicarious imposition of liability upon him if and when the government chooses to sue for enforcement of the restitution claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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